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October 16, 2002

**Via Electronic Mail**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room TW-B204  
Washington, D.C. 22554

Re: ***Enhanced 911 Emergency Calling Systems – Phase II  
Compliance Deadlines for Non-Nationwide CMRS  
Carriers – CC Docket No. 94-102; FCC 02-210***

Dear Ms. Dortch:

To facilitate public retrieval of these comments, we are refileing the attached comments, which were previously filed in the above-captioned proceeding on September 20, 2002.

Sincerely,

A handwritten signature in black ink, appearing to read "Luisa L. Lancetti", with a long horizontal flourish extending to the right.

Luisa L. Lancetti

Attachment

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Revision of the Commission's Rules	)	CC Docket No. 94-102
To Ensure Compatibility with	)	
Enhanced 911 Emergency Calling Systems	)	
	)	
Phase II Compliance Deadlines for Non-	)	FCC 02-210
Nationwide CMRS Carriers	)	

**COMMENTS OF SPRINT CORPORATION**

Sprint Corporation, on behalf of its wireless division ("Sprint"), submits these comments in response to the reconsideration petitions filed by ALLTEL Communications, American Cellular Corporation, and Dobson Cellular Systems (collectively, "Petitioning Carriers").<sup>1</sup> The Petitioning Carriers read their *Phase II Stay Order* as imposing a new "strict liability" standard on them, whereby they will be subject to enforcement action even if they fail to meet the Phase II deadlines due to circumstances beyond their control.<sup>2</sup> As Sprint has previously explained,<sup>3</sup> imposition of such a strict liability standard would be unlawful, and Sprint is therefore confident that the Commission did not intend to impose such a "strict liability" standard.

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<sup>1</sup> See *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Petitions for Reconsideration Regarding Order to Stay E911 Phase II Rules for Small Carriers, DA 02-2285 (Sept. 16, 2002). See also ALLTEL Communications Petition for Reconsideration, CC Docket No. 94-102 (Aug. 26, 2002); Joint Dobson Cellular and American Cellular Petition for Reconsideration, CC Docket No. 94-102 (Aug. 26, 2002).

<sup>2</sup> See *Revisions to the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadline for Non-Nationwide CMRS Carriers*, CC Docket No. 94-102, *Order to Stay*, FCC 02-230 (July 26, 2002) ("Phase II Stay Order"). The Commission has historically granted waivers of its Phase II E911 deadlines, and it is unclear why in this instance it chose instead to use the stay procedure.

<sup>3</sup> See Sprint Comments, CC Docket No. 94-102 (Dec. 14, 2001).

**I. THE COMMISSION SHOULD CONFIRM THAT IT DID NOT INTEND TO APPLY A NEW "STRICT LIABILITY" WAIVER STANDARD**

Sprint does not believe that the Commission intended to impose a "strict liability" standard on wireless carriers implementing Phase II E911 service because such a standard would be unlawful and unenforceable. To remove any uncertainty and controversy, the Commission should confirm that it did not intend to adopt such a new standard.

Commission rules permit waivers "for good cause shown."<sup>4</sup> The Commission has consistently granted waivers of FCC deadlines when noncompliance is due to circumstances "beyond the licensee's control."<sup>5</sup> Thus, for example, the Commission recognized in establishing its wireless E911 rules that carriers may obtain waivers when vendors do not make their E911 modifications timely available or when local exchange carriers ("LECs") do not timely upgrade the E911 network.<sup>6</sup> The Commission has similarly entered repeated waivers of the TTY requirement for digital wireless systems because there was no solution available for carriers to implement.<sup>7</sup>

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<sup>4</sup> 47 C.F.R. § 1.3. Courts have held that the FCC must establish a waiver process with any requirement that it may impose. *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969) (Waiver process constitutes "an important member of the family of administrative procedures," and "a system where regulations are maintained inflexibly without any procedure for a waiver poses legal difficulties."). *See also AT&T Wireless v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001), *quoting WAIT Radio*, 418 F.2d at 1157 (FCC "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.").

<sup>5</sup> *See* Sprint Phase II Waiver Reply Comments, Docket No. 94-102, at 2 and n.5 (Sept. 4, 2001) (internal citations omitted). *See also* Sprint Phase II Waiver Request, Docket No. 94-102, at 28 and nn. 19-20 (July 30, 2001).

<sup>6</sup> *See First E911 Order*, 11 FCC Rcd 18676, 18710 ¶ 66, 18718 ¶ 84 (1996); *First E911 Reconsideration Order*, 12 FCC Rcd 22665, 22709 ¶ 91, 22717 ¶ 107, 22724 ¶ 122 (1997). However, Sprint submits that the current procedure – CMRS carriers must submit waiver requests for LEC tardiness – is not efficient or appropriate. Since the LEC possess the facts explaining its tardiness, it should be the LEC, rather than the CMRS carrier, that submits any needed petition for relief.

<sup>7</sup> *See, e.g., E911 Reconsideration Order*, 12 FCC Rcd at 22695; *TTY Waiver Order*, 14 FCC Rcd 1700 (1998).

The Petitioning Carriers read their *Phase II Stay Order* as imposing a new “strict liability” standard whereby they will be ineligible to obtain additional waivers and will instead be subject automatically to enforcement actions if they do not meet the requirements imposed in the *Order* — including in situations where non-compliance is due to circumstances beyond their control. Sprint PCS cannot agree with this view for two reasons, and it urges the Commission to clarify this important matter.

First, Sprint PCS questions whether the Commission possesses the legal authority to adopt the “strict liability” standard that the Petitioning Carriers attribute to the Commission. While the Communications Act empowers the Commission to penalize a carrier for “fail[ing] to comply with . . . any rule, regulation, or order issued by the Commission,” with certain exceptions not relevant here,<sup>8</sup> such a penalty is appropriate only if the carrier’s action is “willful.”<sup>9</sup> Clearly, a wireless carrier’s failure to meet a certain Phase II E911 deadline because of circumstances beyond its control (*e.g.*, vendor does not timely provide needed modifications, LEC does not timely upgrade the E911 network), cannot be a “willful” act or omission – regardless of how the term willful may be defined.<sup>10</sup>

Second, even if the Commission possesses the statutory authority to adopt a “strict liability” standard, it appears reasonably clear that the Commission did not intend to do so in the *Phase II Stay Order*. As noted above, the Commission has repeatedly held that waivers of FCC deadlines are appropriate when noncompliance is due to circumstances “beyond the licensee’s

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<sup>8</sup> See 47 U.S.C. § 503(b)(1)(C) and (D).

<sup>9</sup> See *id.* at § 503(b)(1)(B).

<sup>10</sup> See *id.* at § 312(f)(1) (“The term ‘willful’ . . . means the conscious and deliberate commission or omission of such act . . .”).

control.”<sup>11</sup> A strict liability standard – a licensee is not entitled to a waiver even for circumstances beyond its control – would represent both an entirely new waiver standard and a radical change in Commission precedent. While the Commission ordinarily has the flexibility to change its position on issues, courts have held it “elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent”:<sup>12</sup>

[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reasons for doing so. Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.<sup>13</sup>

The *Phase II Stay Order* did not discuss any reason for departing from past precedent regarding the governing standard for waivers; nor did the *Order* even recite the prior precedent. This “omission” is evidence that the Commission did not intend to adopt an entirely new waiver standard – especially since the adoption of a new waiver standard would result in court appeals which would have the effect of delaying the availability of Phase II service.

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<sup>11</sup> See, e.g., *McElroy Electronics*, 13 FCC Rcd 7291, 7295 ¶ 8 (1998) (“We grant extensions of construction deadlines when the failure to construct is due to circumstances beyond the licensee’s control.”); *Norris Satellite*, 12 FCC Rcd 22299, 22303 ¶ 9 (1997) (“This non-contingent requirement has been strictly construed and only waived when delay in implementation is due to circumstances beyond a licensee’s control.”); *21<sup>st</sup> Century Telesis*, 15 FCC Rcd 25113 ¶ 18 (2000) (“The Division has granted waivers of the upfront payment deadline in cases where the applicant’s actions demonstrated that, but for reasons outside the control of the applicant, it would have been able to meet the upfront payment deadline.”); *Telephone Number Portability*, 12 FCC Rcd 7236, 7289 ¶ 92 (1997).

<sup>12</sup> *Channel 41 v. FCC*, 79 F.3d 1187, 1191 (D.C. Cir. 1996).

<sup>13</sup> *Wisconsin Valley Improvements v. FERC*, 236 F.3d 738, 747 (D.C. Cir. 2001) (internal quotations and citations omitted). See also *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001); *AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992).

**II. AT THIS TIME, THE COMMISSION SHOULD FOCUS ITS EFFORTS ON REMOVING OBSTACLES TO PHASE II DEPLOYMENT, NOT ON THREATS OF ENFORCEMENT ACTION**

The public interest is served by the expeditious deployment of Phase II service. Phase II deployment will be accelerated if the Commission removes obstacles to the activation of Phase II service. Threats of commencing enforcement actions based upon a strict liability standard will only divert attention from actual implementation. If wireless carriers are unable to deploy Phase II services as a result of conditions beyond their control, and the Commission attempts to enforce a strict liability standard, carriers will be forced to focus on legal actions to protect themselves rather than deployment of 911 systems. The more productive course would be Commission assistance in removing these obstacles and facilitating the cooperative effort that is required to deploy this complex service. All parties, including equipment manufacturers, PSAPs, ALI database operators (principally, ILECs), 911 vendors and wireless carriers must work together. Attempting to impose all responsibility on one player, who cannot control the actions of the others, will only create division, litigation and delay.

On February 1, 2002, in its First Quarterly Report, Sprint published a Phase II conversion schedule that would have enabled it to comply with its Phase II Waiver Order (complete by the end of this year all valid Phase II requests received by June 30, 2002).<sup>14</sup> Sprint has been unable to meet this schedule because many ILECs that own the ALI databases have chosen not to upgrade their databases to become Phase II capable until later this year. Sprint alerted the Com-

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<sup>14</sup> See Sprint PCS First Quarterly E911 Implementation Report, CC Docket No. 94-102, Attachment D (Feb. 1, 2002).

mission of these ILEC delays over a year ago.<sup>15</sup> The result: Sprint's ability to support Phase II service with many PSAPs will be delayed by six months or longer.

The technical obstacles that many ILECs have imposed on conversion of PSAP Phase II requests should be largely resolved by the end of this year based on the status reports that they submitted on August 28, 2002. However, certain ILECs have chosen to interpose a new obstacle to the timely provision of Phase II service. Although the Commission has been very clear that PSAPs "must bear the costs of maintaining and/or upgrading the E911 components and functionalities beyond the input to the 911 Selective Router, including . . . the Automatic Location Identification (ALI) database,"<sup>16</sup> some ILECs have inexplicably decided to ignore this Commission directive and to attempt to recover ALI upgrade costs from wireless carriers. Sprint has alerted the Commission of this new problem.<sup>17</sup> Unless the Commission acts expeditiously, Phase II service will be further delayed by this newest ILEC obstacle. The Commission should therefore direct LECs to complete their ALI database upgrades as expeditiously as possible and to price those services in conformance with the Commission's previous cost allocation rules.

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<sup>15</sup> See, e.g., Sprint Supplemental Phase II Implementation Report, CC Docket No. 94-102, at 24 (July 30, 2001)("Sprint has made extensive inquiries into LEC readiness. Unfortunately, Sprint is alarmed to learn that LECs have not taken the steps necessary to support Phase II wireless services and do not appear ready to proceed with those upgrades."); Sprint Reply Comments, CC Docket No. 94-102, at 15-16 (Sept. 4, 2001)(Sprint advises FCC of BellSouth announcement that it will not offer a Phase II solution because of "certain regulatory issues" with Sprint asking the FCC to "require all E911 network operators to disclose their Phase II conversion plans market by market."); Sprint Reconsideration/Clarification Petition, CC Docket No. 94-102, at 7 (Nov. 30, 2001)(FCC should "require LECs maintaining ALI databases to publish their Phase II upgrades schedules.").

<sup>16</sup> *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling systems, Request of King County, Washington*, CC Docket No. 94-102, Reconsideration Order, FCC 02-124, at ¶ 4 (May 14, 2002)("King County Reconsideration Order")(emphasis added).

<sup>17</sup> See Sprint Ex Parte, CC Docket No. 94-102 (Sept. 10, 2002); Sprint Ex Parte Letter, CC Docket No. 94-102 (Sept. 9, 2002).

### **III. CONCLUSION**

There is no basis in law or equity to commence an enforcement action against a licensee, much less hold a licensee in violation of FCC rules, for matters that are outside its control. For the foregoing reasons, Sprint respectfully requests that the Commission confirm that it did not change the legal standard for obtaining a waiver in any of its E911 Phase II Stay and Waiver Orders.

Respectfully submitted,

**SPRINT CORPORATION**

/s/ Luisa L. Lancetti

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September 20, 2002